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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

In re J.W., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.W.,

Defendant and Appellant.

A122093

(Del Norte County
Super. Ct. No. JDSQ08-6088)

The juvenile court found that 13-year-old defendant J.W. committed a lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (a)) and misdemeanor unlawful sexual intercourse with a minor (Pen. Code, § 261.5, subd. (b)). The court declared wardship and placed defendant in a group home. Defendant contends his incriminating statements to an investigating detective were erroneously admitted in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). We disagree because the primary admissions were made when defendant was not in custody and the secondary admissions were made after defendant was in custody but indicated he understood his *Miranda* rights. Accordingly, we affirm.

I. FACTS

The victim in this case is defendant's 10-year-old sister, to whom we shall refer as Jane Doe.

In July 2007, about a month after defendant's 13th birthday, defendant lived with Jane Doe, another sister, and his mother. One day that month, defendant threatened to hurt Jane Doe unless she took a bath with him. Defendant and Jane Doe were alone in the house.

Jane Doe was afraid defendant would rape her and asked him if she could wear a bathing suit in the bath. Defendant refused the request. He "said no or he would hit me." Defendant and Jane Doe were in the bath for four or five minutes, during which time defendant kept pulling Jane Doe close to him against her will. This "really scared" Jane Doe, who got out of the bath and wrapped a towel around herself.

Defendant told Jane Doe to go into their mother's bedroom, which she did. Jane Doe told defendant she was going to get dressed, but "he said no or he would hit me again." Jane Doe sat on her mother's bed. Defendant sat down next to her. He had cut off the thumb of a glove, and he placed it on his penis. He got Jane Doe to sit on him, and placed his penis inside her vagina. While doing so he held her down by the waist. She told him to stop because it hurt. He yelled at her and said he would hit her. Defendant stopped on his own.

Eventually, Jane Doe told her mother and the police about the rape.

On April 24, 2008, Del Norte County Sheriff's Detective Ed Fleshman was called to Jane Doe and defendant's house to investigate the report of Jane Doe's rape. He interviewed Jane Doe. He then interviewed defendant, who was sitting on his bed doing homework. Fleshman was wearing civilian clothes. He was carrying a gun, but did not believe it was visible. Defendant knew Fleshman was a policeman.

Fleshman first looked around defendant's room and pointed out various items, such as posters and gaming systems, "just pointing out stuff on the wall [and] having a

conversation” with defendant. They talked about defendant's school and what computer games he was playing. Defendant did not try to leave the room or the house. Fleshman did not tell defendant he was under arrest or that he was not free to leave. But Fleshman testified there were other deputies downstairs and that, as far as Fleshman was concerned, defendant was not free to leave if he chose to run.

Fleshman eventually sat on the far side of the room, so that defendant was between Fleshman and the door. Fleshman told defendant that Jane Doe had said he had raped her. Defendant's “body language was reluctant” but he did not say that he did not want to talk to Fleshman.

Defendant initially denied the rape. Eventually he admitted that while he and Jane Doe were in the bathtub, he got the idea to retrieve the thumb portion of the glove and use it as a condom. He admitted placing his penis in Jane Doe's vagina, to half the depth of the head of his penis. He stopped because he couldn't penetrate Jane Doe any further. He admitted Jane Doe told him to stop.

The entire conversation with defendant lasted 10 or 15 minutes.

Fleshman arrested defendant and took him downstairs. He read defendant his *Miranda* rights near a police cruiser. The record shows that defendant understood his rights, with one or two possible exceptions that Fleshman clarified and explained. Fleshman testified that defendant “told me he understood at the end.” The juvenile court found that defendant ultimately understood his rights before questioning.¹

After *Mirandizing* defendant, Fleshman asked him a few clarifying questions about the number of times Jane Doe told him to stop, and whether defendant thought what he had done was wrong. Defendant responded that he didn't think what he did was right because he and Jane Doe were “too young to do that.”

¹ Fleshman described defendant as “a smart kid.”

II. DISCUSSION

Defendant contends his statements to Detective Fleshman were taken in violation of *Miranda*.

We first clear up the confusion in this case between the *Miranda* rule and voluntariness, which are two distinct concepts. To the extent that defendant also argues that his statements were involuntary, he raises a non-issue. Voluntariness was not properly raised below.

There was no written motion to suppress defendant's statements. When Fleshman was first asked about defendant's response when Fleshman told him Jane Doe accused him of rape, defense counsel objected only on *Miranda* grounds. Counsel argued that defendant was not free to leave. It was *the juvenile court* which first mentioned voluntariness. In response to the *Miranda* objection, the court told the District Attorney that he could lay further foundation “on the issue of voluntariness and/or *Miranda*,” subject to defense counsel's voir dire. After some further direct examination of Fleshman, defense counsel made another *Miranda* objection. The court then asked the District Attorney if he was “still wanting to establish the voluntariness” of defendant's statements. The D.A. responded that he was pursuing the issue of custodial interrogation, i.e., *Miranda*.

Defense counsel then conducted voir dire on the issue of whether defendant was the focus of the investigation and was or was not free to leave — issues pertinent to a *Miranda* analysis, not to voluntariness. Both counsel then conducted additional voir dire on *Miranda*-related issues.

The juvenile court then heard argument on the admissibility of the statements. Both parties focused solely on *Miranda*, and the question whether the bedroom statements were the result of custodial interrogation. The court ruled the statements admissible on the ground that defendant, although being interrogated by Fleshman, was not in custody. The court ruled that regardless of Fleshman's subjective determination

that defendant was not free to leave, a reasonable person in defendant's situation would not believe he was “confined or restrained.”

Subsequently, defense counsel raised a *Miranda* objection to the post-arrest statements, on the ground that defendant did not understand his rights. Both counsel conducted voir dire on that issue alone. The juvenile court found defendant understood his *Miranda* rights and admitted the statements.

At no time was the issue of voluntariness explored or developed. Voluntariness is simply not an issue in this case.

The only issue in this case involves *Miranda*. Defendant contends that his statements in his bedroom (“primary statements”) and his post-arrest statements (“secondary statements”) were both the result of *Miranda* violations. We disagree for the reasons set forth below.

Primary Statements. The question here is whether defendant was in custody within the meaning of *Miranda* when he made his incriminating statements to Fleshman in his bedroom. Custody is defined as being deprived of one’s freedom of action in a significant way. Custody is determined by an objective test, i.e., whether a reasonable person under the circumstances would have felt that he was not free to leave. (*People v. Ochoa* (1998) 19 Cal.4th 353, 401-402 (*Ochoa*); *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161 (*Aguilera*).) An officer’s uncommunicated subjective views about the suspect or the nature of the interrogation are irrelevant. The test is whether an objective person would feel they were not free to terminate the interview and leave. (*In re Joseph R.* (1998) 65 Cal.App.4th 954, 960.)

As a reviewing court, we accept the juvenile court’s findings of historical fact if they are supported by substantial evidence, but we make an independent determination whether an interrogation was custodial. (*Aguilera, supra*, 51 Cal.App.4th at pp. 1161-1162; see *Ochoa, supra*, 19 Cal.4th at pp. 401-402.) A variety of factors feed into the determination of whether or not an interrogated suspect is in custody; they are set forth in

Aguilera, supra, at p. 1162, and we need not reproduce them here. No one factor is dispositive (*ibid.*), including the defendant's youth. (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 666-669.)

Here defendant was in his own home, in his own bedroom. He knew Fleshman was a police officer. Fleshman was in civilian clothes and his weapon was concealed. Fleshman spoke with defendant for a brief time, beginning with innocuous talk about defendant's school and computer games. Fleshman did not tell defendant he was not free to leave. Defendant did not ask to leave. Defendant could reach the door without physically confronting Fleshman. Although he was 13, defendant was described as "smart." Although Fleshman was focused on defendant as a suspect and believed defendant was not free to leave had he tried to flee, these were subjective views which were not communicated to defendant. Under the totality of the circumstances, we conclude that defendant was not in custody and his statements did not violate *Miranda*.

Secondary statements. Defendant contends his statement taken after his arrest violated *Miranda* because he did not understand his rights. Defendant selectively cites testimony suggesting only that defendant *initially* did not entirely understand some of his rights. Defendant overlooks the fact that Fleshman's testimony, viewed in its entirety, shows that Fleshman explained the rights that defendant did not at first understand — and that defendant, as the juvenile court found, ultimately did understand his rights. In any case, the secondary statements were of little impact given the admissions in the primary statements.

Defendant's statements were properly admitted.

III. DISPOSITION

The jurisdictional and dispositional findings and orders are affirmed.

Marchiano, P.J.

We concur:

Margulies, J.

Graham, J.*

* Retired judge of the Superior Court of Marin County assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.